No. 17-532

In the Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition for Writ of Certiorari to the District Court of Wyoming, Sheridan County

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF 1
I. The Decision Below Is Incorrect 2
II. Federal And State Courts Are Divided 5
III. There Are No Obstacles To Reviewing This Important Issue 7
CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Bobby v. Bies,
556 U.S. 825 (2009) 2, 8, 9

Cooper v. Harris,
137 S. Ct. 1455 (2017) 11

Crow Tribe of Indians v. Repsis,
73 F.3d 982 (10th Cir. 1995) 1, 3, 9

Minnesota v. Mille Lacs Band of Chippewa Indians,
526 U.S. 172 (1999) ..... *passim*

State v. Arthur,
261 P.2d 135 (Idaho 1953) 6

State v. Buchanan,
978 P.2d 1070 (Wash. 1999) 5, 6

State v. Stasso,
563 P.2d 562 (Mont. 1977) 6

State v. Tinno,
497 P.2d 1386 (Idaho 1972) 6

Swim v. Bergland,
696 F.2d 712 (9th Cir. 1983) 5

Ward v. Race Horse,
163 U.S. 504 (1896) 4, 8

Statute

An Act to Provide a Temporary Government for the Territory of Wyoming, July 25, 1868, 15 Stat. 178 3

Other Authorities

Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 Idaho L. Rev. 475 (2005) 10

Restatement (Second) of Judgments §27 (1982) 9

REPLY BRIEF

This Court has unequivocally established that Indian "[t]reaty rights are not impliedly terminated upon statehood," and that Congress is required to "clearly express" its intent to abrogate such rights. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, 207 (1999). Flouting those straightforward principles, the court below concluded that 149-year-old federal treaty rights allowing the Crow Tribe of Indians to hunt on the "unoccupied lands of the United States" are categorically extinct, and Crow Tribe members can be criminally convicted for engaging in expressly protected conduct. That decision and the decision on which it relied, *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), are profoundly wrong, in conflict with numerous other decisions, and have resulted in Petitioner's unjust conviction. Certiorari is warranted.

On the merits, the state hardly defends the decision below or *Repsis*, and understandably so. The 1868 Treaty between the Tribe and the United States identifies the events that lead to termination of the hunting rights, and Wyoming's statehood is not one of them. That makes statehood an implicit event of abrogation, which is the very theory repudiated by *Mille Lacs*. Nor does the novel notion that the Bighorn National Forest "occupied" the Tribe's hunting grounds and extinguished its treaty rights fare any better, because the statute authorizing that forest expressly disclaimed any intent to abrogate Indian treaties.

The state's response to the split of legal authority implicated by the decision below and *Repsis* is to ignore two conflicting decisions and to deem the others distinguishable based on differing treaty language. But the language of one of those treaties is *identical* to the 1868 Treaty's language, and the language of the other treaties is materially identical. Disregarding relevant decisions and identifying distinctions without a difference does not render the split illusory.

The state primarily urges denial of review because, under collateral estoppel principles, *Repsis* forever prevents the Tribe from vindicating its federal rights. But *Repsis* concluded that Wyoming's statehood impliedly abrogated the Tribe's treaty rights, and *Mille Lacs* subsequently held that statehood does no such thing. Because the "applicable legal context" undergirding *Repsis* has undoubtedly changed, collateral estoppel is inapplicable. *Bobby v. Bies*, 556 U.S. 825, 834 (2009). And this Court does not need any more developed record to resolve the purely legal question presented here, which has thoroughly percolated in these and other proceedings. In short, nothing prevents this Court from deciding the exceptionally important question whether federal treaty rights foundational to the Crow Tribe's well-being and identity have been extinguished in perpetuity and, consequently, Tribe members can be criminally convicted for engaging in protected activity.

I. The Decision Below Is Incorrect.

The state doubles down on the judgment below, emphatically asserting that the Tribe's federal-treaty hunting rights are categorically extinct and have been since *Repsis*. Opp.2. But it offers no real defense of

the only two possible justifications for that conclusion: Wyoming's admission to the Union in 1890 and the establishment of the Bighorn National Forest in 1897. *See Repsis*, 73 F.3d at 992-93, 994. That is unsurprising, for both rationales are indefensible.

As for Wyoming's admission to the Union, *Mille Lacs* made clear that Indian "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. But the only way Wyoming's statehood could have terminated the Tribe's hunting rights is *by implication*, as the state's arguments confirm. The state cites no language in Wyoming's statehood act that abrogated the hunting rights. Nor does the state identify anything in the 1868 Treaty providing that Wyoming's statehood would abrogate those rights. The 1868 Treaty specifically identified the conditions that would terminate the Tribe's hunting rights: (1) the hunting grounds become occupied; (2) the grounds cease to be owned by the United States; (3) game is no longer found on the grounds; or (4) peace no longer subsists between the Tribe and settlers. Pet.20-21. Wyoming's statehood is conspicuously absent. Understandably so: when the 1868 Treaty was signed, Wyoming was not even a *territory*. *See* An Act to Provide a Temporary Government for the Territory of Wyoming, July 25, 1868, 15 Stat. 178.

The state counters that, under *Mille Lacs*, "the proper inquiry is whether Congress intended treaty rights to be perpetual or to expire upon the happening of a clearly contemplated event, such as statehood." Opp.7; *see id.* at 20-22. But this gets the state nowhere, because *Mille Lacs* did not consider "statehood" to be a "clearly contemplated event" in

either the treaty before it or the treaty at issue in *Ward v. Race Horse*, 163 U.S. 504 (1896)—which, the state concedes, used the same relevant language as the 1868 Treaty. Opp.1, 5, 27. Instead, *Mille Lacs* expressly stated that in the *Race Horse* treaty (and, *a fortiori*, the identical 1868 Treaty), the "rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." 526 U.S. at 207. Again, there is no mention of statehood, which is precisely why *Mille Lacs* made clear that "[t]reaty rights are not impliedly terminated upon statehood." *Id.* That emphatic pronouncement would have been completely unnecessary if the relevant treaties before the Court "clearly contemplated" statehood as a rights-terminating event. Put simply, *Mille Lacs* forecloses any suggestion that Wyoming's admission terminated the Tribe's treaty hunting rights.

If the state's argument regarding Wyoming's admission is unpersuasive, its argument regarding the creation of the Bighorn National Forest is nonexistent. The state does not defend the proposition that the Tribe's rights to hunt expired when President Cleveland established the forest, save that the court below "properly concluded, consistent with the Tenth Circuit's analysis in *Repsis*, that the Bighorn National Forest is occupied as a matter of law within the meaning of the Treaty." Opp.14. That *ipse dixit* is no answer to the relevant text of the Forest Reserve Act and President Cleveland's proclamation, well-established precedent, and common sense, all of which thoroughly refute the state's assertion. Pet.21-24.

II. Federal And State Courts Are Divided.

The state insists that there is "no split of authority in need of reconciliation." Opp.2, 25-26. The state does not dispute, however, that the court below squarely held that "*Mille Lacs* did not overturn *Race Horse*," Pet.App.24, yet other courts have just as squarely held that this Court "overruled *Race Horse* in ... *Mille Lacs*," *State v. Buchanan*, 978 P.2d 1070, 1083 (Wash. 1999). One can hardly conceive of a starker conflict—and over the two precedents most relevant to this case. Furthermore, the Ninth Circuit has explicitly "reject[ed]" the proposition that the Forest Reserve Act "gave [the president] the power to extinguish Indian treaty rights in those [federal] lands." *Swim v. Bergland*, 696 F.2d 712, 717 (9th Cir. 1983). Again, that is the exact opposite conclusion reached in the decision below and *Repsis*, both of which agreed that President Cleveland could lawfully extinguish the Tribe's hunting rights through the Forest Reserve Act. *See* Pet.App.33-34. Remarkably, the state does not even address *Buchanan* or *Swim*. It is easy to claim that "no split of authority" exists when one ignores the conflicting decisions.

The state next asserts that *Repsis* and the decision below do not conflict with any decisions addressing other treaties that reserved off-reservation rights like those reserved in the 1868 Treaty, ostensibly because those treaties contain "distinct language." Opp.26. But there is nothing "distinct" about the treaty language at issue in *State v. Tinno*, where the Idaho Supreme Court considered an 1868 treaty between the United States and the Eastern Band Shoshone and Bannock Tribes that preserved

fishing rights for those tribes on the "unoccupied lands of the United States." 497 P.2d 1386, 1389-90 (Idaho 1972). That language is *identical* to the language at issue here (and in the *Race Horse* treaty, for that matter). *Tinno* is thus directly on point and contrary to the decision below and *Repsis*: Addressing whether national forestland is included within the "unoccupied lands of the United States," the *Tinno* court concluded that under "[a] plain reading of the treaty provision," there was "no serious geographical question presented." *Id.* at 1391.

Nor can the state distinguish the Crow treaty from the "Stevens treaties" addressed by several state supreme courts, which reserved for various tribes the right to hunt on "open and unclaimed" lands. Opp.26. There is no material difference (and the state identifies none) between language in the Stevens treaties referring to "open and unclaimed" lands and language in the Crow treaty referring to "unoccupied" lands. The Washington Supreme Court held as much in *Buchanan*, when it defined "open and unclaimed" lands in the Stevens treaties as "publicly-owned lands, which are not obviously occupied." 978 P.2d at 1082. And the Montana Supreme Court, relying on Idaho Supreme Court precedent, similarly defined "open and unclaimed" lands in the Stevens treaties as including lands "'not settled and occupied.'" *State v. Stasso*, 563 P.2d 562, 565 (Mont. 1977) (quoting *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953)); *see also id.* ("open and unclaimed" lands encompass "National Forest lands"); *Arthur*, 261 P.2d at 141 ("National Forest Reserve ... was 'open and unclaimed land.'").

Finally, the state does not contest that the split encompasses states containing the vast majority of the Nation's forestland and home to Native American tribes whose treaties are substantially similar (if not identical) to the 1868 Treaty. *See* Pet.27 n.9. This Court's resolution of the unsettled law is thus all the more critical.

III. There Are No Obstacles To Reviewing This Important Issue.

The state does not dispute that the issue here is important to the Crow Tribe. Nor could it. As *amici* attest, "[b]y curtailing the longstanding right to hunt outside the limits of the reservation, the decision below poses a dire threat" to all members of the Tribe, Anthropologists Br.10, who will now be "subject to criminal penalties for engaging in treaty-guaranteed off-reservation hunting," even subsistence hunting, Crow Tribe Br.12. And, of course, this case will literally affect whether Petitioner, who was criminally convicted for engaging in conduct that a federal treaty expressly protects, can provide for his family. Pet.29.[1]

More broadly, this case affects numerous other tribes, as no fewer than 19 federal treaties protect the

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[1] The state disputes that Tribe members depend upon their treaty-preserved hunting rights to feed their families. Opp.8 n.2. But none of the state's citations actually refutes that proposition. Furthermore, despite attempting to malign Petitioner's motives, the state does not contest that Petitioner was hunting for subsistence purposes during the hunt that gave rise to his conviction. *See* Pet.App.5 (court acknowledging that Petitioner "took the meat back with [him] to Montana"); R.1466 (state exhibit informing jury that the "tribal hunters ... later distributed the elk meat among their families").

"right to hunt on Federal lands away from the[] respective reservations." Crow Tribe Br.9; *see also* Law Professors Br.14 ("Reserved [h]unting and fishing rights are significant in a public health context because many tribal communities rely upon these traditional foods for subsistence."); Pet.28-29. The state downplays the broader implications by claiming that some treaties use language that is only synonymous, rather than identical, to the Crow treaty language, Opp.26, but as already explained, those are distinctions without a difference.

Instead, the state places most of its chips on the collateral estoppel doctrine introduced *sua sponte* by the court below, arguing that *Repsis* precludes Petitioner and *all* Crow members from *forever* exercising their treaty hunting rights. Opp.14-22. Indeed, the state takes the remarkable position that "even if [Petitioner] were correct that in light of *Mille Lacs*, *Repsis* was wrongly decided, this specific right has been adjudicated and is final." Opp.18. That is not how collateral estoppel works.

Under federal collateral-estoppel law—which indisputably governs here—collateral estoppel does not apply when "a change in the applicable legal context" occurs after the earlier judgment. *Bobby*, 556 U.S. at 834; Pet.30. That principle is dispositive here, as there have indisputably been profound shifts in the law undergirding *Repsis*. In 1896, *Race Horse* concluded that Wyoming's statehood impliedly terminated the Bannock Tribe's treaty rights. 163 U.S. at 514. *Repsis* followed suit in 1995 by relying on *Race Horse* to declare that identical rights-preserving language in the Crow Tribe's treaty was impliedly

"repealed by the act admitting Wyoming into the Union." 73 F.3d at 992, 994. But *Mille Lacs* then established in 1999 that Indian "[t]reaty rights are not impliedly terminated upon statehood." 526 U.S. at 207. It is difficult to imagine a more substantial legal change than that.[2]

Echoing the court below, the state nevertheless insists that *Mille Lacs* "did not overrule" *Race Horse*, and thus *Repsis* maintains collateral-estoppel effect. Opp.19; Pet.App.24 n.6. As a threshold matter, the standard for deeming collateral estoppel inapplicable is not whether a decision has been "overruled," but rather whether there has been a "change in the applicable legal context," as the state elsewhere admits. Opp.15. *Mille Lacs* undoubtedly did at least that much: *Repsis* squarely held that Wyoming's statehood impliedly repealed the Tribe's hunting rights, and *Mille Lacs* just as squarely held that statehood does not impliedly repeal Indian treaty rights.

Regardless, all nine members of the *Mille Lacs* Court would disagree that *Mille Lacs* did not overrule

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[2] Relying on dated decisions, the state suggests that *Repsis*'s observation that President Cleveland's presidential proclamation "occupied" the Bighorn National Forest should be accorded preclusive effect. Opp.17-18. This Court's recent precedent, however, unequivocally holds that collateral estoppel applies only to a determination "essential to the judgment," and a determination is "essential" only when "the final outcome hinges on it." *Bobby*, 556 U.S. at 835 (citing Restatement (Second) of Judgments §27 cmt. h (1982)). The state does not dispute that *Repsis*'s "final outcome" did not "hinge[]" on its alternative determination regarding the proclamation, rendering collateral estoppel inapplicable.

Race Horse. The dissent repeatedly accused the majority of "overrul[ing]" *Race Horse*—in whole, not in part—without objection by the majority. 526 U.S. at 219 & n.3, 220 (Rehnquist, C.J., dissenting). And commentators have likewise declared *Race Horse* a dead letter following *Mille Lacs*. *See, e.g.*, Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 Idaho L. Rev. 475, 551 n.473 (2005) (noting that "*Race Horse* and its progeny have been effectively abrogated" by *Mille Lacs*).

Even the state concedes that *Mille Lacs* jettisoned the "equal footing" doctrine invoked by *Race Horse*. Opp.20-21. And it essentially admits that *Mille Lacs* rejected *Race Horse*'s "temporary and precarious" doctrine, which the state does not once mention (much less defend) except when describing other courts' holdings. Opp.4-5, 10; Pet.31-32.[3] It is thus unclear what, exactly, the state thinks remains of *Race Horse* after *Mille Lacs*. The state claims at several points that *Mille Lacs* "expressly approved" the "alternative holding of *Race Horse*." Opp.6-7, 15, 20. But that argument grossly misreads *Mille Lacs*, which, in addressing that "alternative holding," repudiated "the line suggested by *Race Horse*"—*i.e.*, the "temporary and precarious" doctrine invoked by *Repsis* and the decision below—and held instead that the appropriate inquiry is whether the treaty contains a "clearly

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[3] The state's virtual abandonment of the "temporary and precarious" doctrine is especially telling since that doctrine was the *sole* aspect of *Race Horse* that the court below believed to survive *Mille Lacs*. *See* Pet.App.24 n.6.

contemplated" event that would terminate a reserved right. *See* pp. 3-4, *supra*.

At a minimum, the federal collateral-estoppel issue here presents no barrier to review because it is inextricably intertwined with the question presented. Pet.32. Whether the Crow Tribe retains its treaty-preserved hunting rights depends on the scope of *Mille Lacs*, including the extent to which it overruled *Race Horse* and abrogated *Repsis*—which is the same analysis underlying the collateral-estoppel inquiry. Nothing prevents this Court from addressing (and rejecting) the state's argument on plenary review, as the state's citations demonstrate. *See Cooper v. Harris*, 137 S. Ct. 1455, 1467-68 (2017) (addressing and rejecting collateral-estoppel argument). And it would be especially misguided to deny review based on collateral estoppel when the decision below alternatively *addressed the merits*. Pet.App.31-34; Opp.14.

Finally, the state contends that the question presented "cannot be reviewed ... without a developed record." Opp.24; *see id.* at 22-24. But as the court below acknowledged, whether the Tribe's federal treaty hunting rights have terminated is a pure "question[] of law." Pet.App.9. That question—and the relevant legal and historical authorities bearing upon it—has been exhaustively addressed in this case and other cases examining materially similar treaties.[4] In any event, the record in this case (to say nothing of the *amicus* briefs) contains hundreds of

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[4] Accordingly, as both courts below recognized in deciding this *legal* issue, it is utterly irrelevant that the trial court "did not rule on the admissibility of" some of Petitioner's exhibits. Opp.23.

pages of evidence about the history of the 1868 Treaty, its negotiations, and the practical construction adopted by the parties. As it did in *Mille Lacs*, this Court can safely draw upon those documents to determine the answer to the important legal issue before it.[5]

At bottom, there are no obstacles to deciding whether the rights of all Crow Tribe members should eternally be held hostage to legal reasoning that flunks every test of treaty interpretation, statutory interpretation, and common sense. But if these century-old federal treaty rights really are no longer the "supreme Law of the land," and Tribe members can be criminally convicted for engaging in expressly protected activities, the Tribe deserves to receive that extraordinary judgment from this Court.

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[5] The state repeatedly raises the factbound issue of "conservation necessity," *i.e.*, whether, if the Tribe possesses treaty hunting rights, the state can prove that its hunting regulations as applied to the Crow are justified by conservation necessity. Opp.11, 18, 22, 24-25. But that issue is not before this Court and presents no barrier to review because the court below categorically held that the Crow Tribe had *no* treaty hunting rights. *See* Pet.App.14 n.3 (finding it "unnecessary to address the conservation necessity issue" because "the treaty rights do not exist").

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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